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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN MINING CONGRESS, AMAX, INC., ASARCO INCORPORATED, ST. JOE MINERALS CORPORATION,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

BRIEF OF ALUMAX, INC. AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Alumax, Inc. ("Alumax")[1] respectfully submits this Brief of Amicus Curiae in support of the petition for a writ of certiorari.[2] Alumax is an integrated producer of aluminum and aluminum products. Its operations are subject to a broad range of federal laws and regulations, including those administered by respondent Environmental Protection Agency. Alu-

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[1] Alumax is a publicly held company. Alumax is affiliated with petitioner AMAX, Inc. in that AMAX, Inc. owns 50% of Alumax's outstanding stock.

[2] Pursuant to Rule 42, the written consent of the parties is filed concurrently with this brief.

max frequently participates in federal administrative rulemaking proceedings and consequently has a substantial interest in the process by which federal regulations are developed under the Administrative Procedure Act.

ARGUMENT

I. Summary of Argument

A. Introduction

This case, reported below as *Kennecott v. EPA*, 780 F.2d 445 (4th Cir. 1985), presents an issue of fundamental importance under a major federal environmental statute and the governing procedures of the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"). The case arises out of petitions to review national standards (known as effluent limitations guidelines) set by the Environmental Protection Agency ("EPA" or "Agency") for the nonferrous metals industry in a rulemaking proceeding under the Clean Water Act, 33 U.S.C. §§ 1251-1376; 40 C.F.R. § 421.

In proposing these effluent limitations EPA sought comment on six specific technologies for the control of water pollution effluents. The Clean Water Act requires limits to be based on the best technology achievable, taking certain factors into consideration. After receiving comments on the proposed technologies, and determining that industry would not be able to meet proposed limits with those technologies, EPA decided to adopt and promulgate regulations based on a substantially different technology, sulfide precipitation, about which the public had not been placed on notice, and that had not been the subject of any comment.

Several parties filed petitions for review of the regulations in the United States Court of Appeals for the Fourth Circuit, pursuant to 33 U.S.C. § 1369(b), and the Fourth Circuit upheld EPA's action. In so doing, the Court merely deferred to the Agency's claimed expertise, and failed to hold the Agency to the notice and fairness requirements of the APA. Since the technology adopted by EPA was never exposed to comment because of lack of notice, the court based its determination on a fatally deficient administrative record and thus was not in a position to determine whether the rule was the product of an informed and reasoned judgment.

B. The EPA Rulemaking Proceeding

The Clean Water Act requires the national effluent guideline regulations to "identify . . . the degree of effluent reduction attainable through the application of the best control measures and practices achievable." 33 U.S.C. § 1314(b)(2)(A). In promulgating these regulations, EPA must identify the best control measures and practices achievable, and then based on the technology chosen, set the actual discharge limits. The identification of the control measure is the crucial step because the actual effluent limits are, by statute, based on the particular technology selected. Although the control technology from one industry may be "transferred" to another if the processes are similar, EPA may choose to have different discharge limits for the two different industries.

On February 17, 1983, EPA, pursuant to section 304 of the Clean Water Act, 33 U.S.C. § 1314, proposed twelve sets of nationally applicable effluent guideline regulations for "Nonferrous Metals Manufacturing." In the rulemaking at issue, EPA published

in the *Federal Register* proposed effluent limitations and specified the six pollution control technology options it was considering, and it requested specific comments on them or any other alternative technologies.[3]

Following the publication of notice in the *Federal Register*, EPA distributed a proposed Development Document, not published in the *Federal Register*. That 3-volume, 2100 page document generally identified 25 existing treatment technologies, including a process known as sulfide precipitation. The *Federal Register* notice specified the six particular technologies being considered, and it set forth the limits those technologies could achieve. Sulfide precipitation was never mentioned in that notice.

At no time following the distribution of the proposed Development Document was sulfide precipitation mentioned as an alternative or supplement to the six options, nor did any of the voluminous comments submitted discuss sulfide precipitation.

C. Decision Below

In denying the petitions for review, the Fourth Circuit rejected the claim that the petitioners had not

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[3] The proposal included a list of both "in-process" systems and "in-place" systems considered for proposal, and then specified the six "control and treatment options" that were selected for final consideration, and requested comments on those. "The Agency specifically requests long-term sampling data (especially paired raw wastewater-treated effluent data) from nonferrous metals manufacturing plants having well-operated treatment systems using the treatment technologies relied upon for this regulation, and also other equally effective treatment technologies." 48 Fed. Reg. 7073 (1983).

been placed on notice of the new technology and held that they "should reasonably have known that EPA was considering sulfide precipitation." 780 F.2d at 452. Although the court recognized that sulfide precipitation was not one of the six control and treatment options identified in the *Federal Register* notice of the proposed rule, the court noted that the preamble to the proposed rules "specifically asked for comments on alternative treatment technologies." *Id.* Moreover, the court noted that EPA's associated Development Document "included both lime and settle and sulfide precipitation in its discussion of effective chemical precipitation methods." *Id.* The Fourth Circuit relied on the "logical outgrowth" rule and concluded that "EPA did not violate the requirements of the Administrative Procedure Act when, in an attempt to respond to industry comments and complaints, it added sulfide precipitation as a supplement to the Best Available Technology on which its effluent limitations were grounded." *Id.* at 453.

The Fourth Circuit's opinion evidences no inquiry into the administrative record, but defers entirely to the technical information in the Agency's brief. This deference led the court to accept the Agency's position that sulfide precipitation was simply the addition of a second step to the "lime, settle and filter" technology, that it could be transferred to Petitioners' plants from experience gained outside the industry, and that it is a "more effective treatment than the conventional lime and settle process. *Id.* These determinations were based solely on EPA references in the 55,000 page Record, none of which were contained, or referred to, in the *Federal Register* notice.[4]

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[4] The court also denied a Motion of Petitioners to Supplement

II. The Fourth Circuit Did Not Review The Agency's Actions

A. The Fourth Circuit Misinterpreted the Notice Requirements of the Administrative Procedure Act

Section 4 of the Administrative Procedure Act requires that the notice in the *Federal Register* of a proposed rulemaking contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). It is well-settled that this notice requirement benefits both the public and the agency involved, *National Tour Brokers Ass'n. v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978), by encouraging public comment and testing the rules, providing a fair opportunity for all views, and creating a record for judicial review, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1271 n.54 (9th Cir. 1977). Due to the large volume of technical data involved, it is especially important that adequate notice be given in an EPA rulemaking. It is essential for EPA to identify issues and related data with "reasonable specificity" in order to avoid an "elaborate treasure hunt,

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the Administrative Record. In so doing, the court also denied petitioners the opportunity to include in the Record long-term data from a foreign plant (relied upon by EPA) showing that sulfide precipitation would not achieve the prescribed limits; evidence of a meeting between representatives of EPA and the foreign plant (prior to the promulgation of the regulations) in which EPA representatives were told that EPA samplings from that plant were not representative of long-term performance; and petitioners' estimates of the costs of sulfide precipitation. None of this information was considered by the Agency since no comments mentioned sulfide precipitation and no supplemental comments had been allowed on sulfide precipitation after the close of the comment period.

in which interested parties, assisted by high-priced guides (called 'lawyers'), must search the record for the buried treasure of a possibly relevant comment." *Small Refiner Lead Phase-Down Task Force v. EPA, supra*, 705 F.2d at 550. Although the Fourth Circuit opinion pays lip service to the necessity of providing notice "sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking," 780 F.2d at 452, citing *Chocolate Manufacturers Ass'n v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985), it erroneously interpreted what constitutes adequate notice.

The Court of Appeals based its suggestion that petitioners below "should reasonably have known that EPA was considering sulfide precipitation" on two factor: (1) "EPA specifically asked for comments on alternative treatment technologies" in the preamble to the proposed rules; and (2) EPA's associated proposed Development Document mentioned sulfide precipitation among the twenty-five treatment methods identified as effective precipitation methods. 780 F.2d at 452. The suggestion that the Agency's request for "alternative treatment technologies" alone should have placed the public on notice that sulfide precipitation was under consideration, in spite of the fact that it was not mentioned among the six control and treatment options listed in the *Federal Register* notice of February 17, 1983, flies in the face of the APA's requirement that the notice be sufficient to give the public a fair opportunity to comment and participate in the rulemaking. The lack of notice is reflected in the fact that in the comments received, no party even suggested such a technology. The absence of any comments on sulfide precipitation demonstrates the lack

of adequate notice,[5] particularly in light of the substantial comments received by EPA.

The court's reliance upon the proposed Development Document as a source of notice that sulfide precipitation was under consideration is equally misplaced. The 2100 page proposed Development Document was not included in the *Federal Register* notice. The proposed Development Document included a list of more than twenty-five existing water treatment technologies. Sulfide precipitation was one of the technologies discussed, but it was not identified as one of the options under consideration as a proposed model technology. The effect of the Fourth Circuit's decision places an enormous burden on commenters, requiring them to address every detail of a massive, technically complex Development Document despite the fact that the Agency's *Federal Register* notice specified the technologies under consideration.

B. The Fourth Circuit Misinterpreted the "Logical Outgrowth" Rule

The Fourth Circuit also agreed with EPA that the adoption of sulfide precipitation technology was a "logical outgrowth" of the original proposal. 780 F.2d at 452. Under this rule, substantial changes in "the original plan may be made as long as they are 'in character with the original scheme' and 'a logical outgrowth' of the notice and comment already given." *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980),

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[5] See American Frozen Food Institute v. Train, 539 F.2d 107, 135 (D.C. Cir. 1976) which states "the importance of the issue was belied by the obscurity of the footnote intended to give notice, (and) by the lack of meaningful comment."

citing *South Terminal Corp. v. EPA*, 504 F.2d 646, 658, 659 (1st Cir. 1974). The final rule must be a logical outgrowth of the Agency's proposal, and not a response to comments or complaints; a substantial change in a proposed rule based on the comments is not permitted without further notice and opportunity to comment. Clearly, the Agency's proposal must be the source of the notice of a regulatory proposal, comments by other parties do not satisfy that obligation. *National Black Media Coalition v. FCC*, No. 85-4121, slip op. at 3688 (2d Cir. May 27, 1986); *AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985); *Small Refiner Lead Phase-Down Task Force v. EPA*, *supra*, 705 F.2d at 549. *See also Taylor Diving & Salvage Co., Inc. v. Dept. of Labor*, 599 F.2d 622 (5th Cir. 1979); *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972).

Nevertheless, the court below permitted EPA to rely on comments rejecting the six proposed technologies in introducing an entirely new technology about which there had been no notice in the *Federal Register*. Petitioners below could not have been alerted, much less responded to, any changes in the rule prompted by the comments, since neither the proposal nor the comments even mentioned sulfide precipitation. The Fourth Circuit adopted the EPA position on sulfide precipitation which was developed entirely without public input or scrutiny; moreover, the court refused to consider industry data on sulfide precipitation at the time of the petition for review. *See* f.n. 4, *supra*.

The decision below extends the logical outgrowth rule one step too far. In accepting EPA's addition of sulfide precipitation, the court concluded that the ad-

dition was "an attempt to respond to industry comments and complaints."[6] The court also noted that the "comments led EPA to reexamine its selections of model technologies and data basis" and observed that such changes can be a " 'logical outgrowth' of the original proposal and the notice and comments upon it." 780 F.2d at 453. However, none of the comments upon which EPA relied in switching to sulfide precipitation endorsed or even mentioned this alternative technology. Rather, the comments described the failings of the six technologies listed in the *Federal Register* notice. This in not an appropriate basis for permitting EPA to introduce an entirely different technology upon which *no* comment was received.

The court compounded its error by failing to remand the rulemaking to EPA to provide an opportunity to comment on sulfide precipitation and its refusing to permit petitioners below to supplement the administrative record. Absent any public comment on sulfide precipitation the court was not in a position to accept EPA's contentions that sulfide precipitation technology was simply an incidental supplement to "lime, settle and filter;" that sulfide precipitation could achieve the prescribed effluent limits; and that use of the technology in other industries could be validly transferred to the U.S. nonferrous metals in-

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[6] These comments and complaints demonstrated that the six proposed technologies were not appropriate for the specific limits in the regulations. Rather than acknowledge the comments, the Agency rejected all petitioners' data and invoked a new technology to justify its preconceived limits.

dustry.[7] In short, the court did not have a sufficient administrative record upon which to make a reasoned and informed judgment.

The decision below imposes enormous burdens on those who must comment on proposed regulations. It permits EPA or any administrative agency to fulfill the notice requirements of the APA merely by including material in a voluminous Development Document or anywhere else in the record without notice in the *Federal Register*. This permits (in the words of the Fourth Circuit) "ambushing" those who have not addressed all the items described therein. For instance, in the effluent guidelines rulemaking at issue here, commenters would have been compelled to submit data on 25 different pollution control technologies after obtaining the proposed Development Document, which was not contained in the *Federal Register*. The APA does not countenance such administrative slight of hand, which focused attention on one set of technologies only to have the agency adopt an entirely different technology. Such a procedure would frustrate and preclude meaningful comment in the rulemaking process. It would also increase the costs dramatically for those who wish to participate in informal rulemaking proceedings since the entire record becomes subject to comment regardless of what is specified in the *Federal Register* notice.

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[7] See also 780 F.2d at 452-53 where the court makes further specific findings with regard to technical and process matters presented in the EPA brief without any support from material in the administrative record.

III. The Decision Below Creates A Conflict Among The Circuits

The Fourth Circuit's interpretation of "logical outgrowth," in the decision below also conflicts with those of other Courts of Appeal. As discussed *supra*, the Fourth Circuit held that a substantial change in a proposed rule induced by comments or criticisms meets the "logical outgrowth" test.

Decisions in the District of Columbia and Second Circuits and even earlier decisions within the Fourth Circuit have reached contrary conclusions. A recent decision by the D.C. Circuit stated that as "a general rule, [an agency] must *itself* provide notice of a regulatory proposal. Having vowed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. This notice necessarily must come—if at all—from the agency." *AFL-CIO v. Donovan, supra*, 757 F.2d at 340, citing *Small Refiner Lead Phase-Down Task Force v. EPA, supra* 705 F.2d at 549 (emphasis in original). The decision also conflicts with a recent decision by the Second Circuit. In *National Black Media Coalition v. FCC*, No. 85-4121 (2d Cir. May 27, 1986) the court remanded the case to the Federal Communications Commission for failing to comply with section 4 of the APA. The FCC had announced in a notice published in the *Federal Register* that station applications from minority groups would receive preferential treatment. In its final report, and without prior public notice, the FCC announced that there would be no minority preference policy. In remanding the case, the court remarked, "[t]he FCC now attempts to defend its notice by contending that interested parties were invited to submit other proposals."

Slip Op. at 3687. The Second Circuit rejected that defense and remarked, "if this were enough . . . an agency could simply propose a rule and state that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration." *Id.*

In this case, the Fourth Circuit approved EPA's promulgation of a substantially new regulation which was not even based on a new comment, but rather on the Agency's internal determination that the six proposed technologies were not appropriate. It also introduced the element of the Agency's good faith, 780 F.2d at 452, which is irrelevant to the issue of notice and is not a legal substitute for it.

The decision below also conflicts with another Fourth Circuit decision, *Chocolate Manufacturer Ass'n v. Block*. 755 F.2d 1098 (4th Cir. 1985), cited in the decision below. In *Chocolate Manufacturers Ass'n*, the agency proposed regulations concerning the sugar content of federally funded food packages. Flavored milk and its sugar content was not placed in issue by the proposed rule. However, in response to public comment, flavored milk was removed from the program due to its high sugar content.

In that case, the Fourth Circuit recognized that an agency may promulgate a final rule different from the proposed rule, but when the final rule substantially departs from the proposed rule, the original notice is inadequate. The court noted that at the time of proposal the public had not had any indication that flavored milk was at issue, and the very detailed and specific preamble to the proposed rule did not discuss flavored milk. In striking down the final rule, the

court specifically addressed the "logical outgrowth" rule. 755 F.2d at 1105-1106. The court said it did not feel the petitioner was "fairly treated or that the administrative rulemaking process was well served by the drastic alteration of the rule without an opportunity for CMA to be heard." *Id.* at 1106. In the case below, the Fourth Circuit did not distinguish the *Chocolate Manufacturers Ass'n* decision, and cited the case only for the general proposition that an agency may promulgate a final rule that differs in some particulars from its proposals. The court ignored the very detailed and specific *Federal Register* notice and blindly upheld the Agency regulations.

CONCLUSION

This is a case of fundamental importance for agency proceedings, particularly where technical material is involved. In denying the petition for review, the Fourth Circuit failed to meaningfully review the Agency's action. In doing so it also permitted the Agency to violate the notice requirement of the APA and misinterpreted the logical outgrowth rule. The Fourth Circuit's decision creates a conflict among the circuits. For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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